

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

*Robert L. Myers and
Betty A. Myers,*

BKY 04-33794 GFK

Chapter 13

Debtors.

**NOTICE OF MOTION AND MOTION OBJECTING TO CONFIRMATION OF
CHAPTER 13 PLAN**

TO: All parties entitled to notice under Local rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. A hearing on this motion will be held before the Honorable Gregory F. Kishel, Courtroom 228B, U. S. Courthouse, 316 North Robert Street, St. Paul, Minnesota at 10:30 a.m. on October 28, 2004, or as soon thereafter as counsel may be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 27, 2004, which is 24 hours (one business day) before the time set for the hearing, or filed and served by mail not later than October 25, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. The Court has jurisdiction pursuant to 28 U.S.C. §157 and §1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 13 case was filed on June 28, 2004. The case is now pending in this Court.

5. This motion arises under 11 U.S.C. §1307, 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Movant requests relief with respect to denial of confirmation of the Debtors' proposed Chapter 13 Plan dated October 18, 2004 (the "Plan"). If testimony is necessary as to any facts relevant to this motion, the Trustee reserves the right to call an employee of the Chapter 13 Trustee, 310 Plymouth Building, Minneapolis, Minnesota, and/or the Debtors to present testimony.

6. The Plan calls for the Debtors to make payments to the Trustee of \$700 per month for 34 months, for a total of \$23,800, than 14 additional payments of \$1,514, for a total of \$21,196, for an aggregate total of \$44,996 (the "Plan Funds").

7. The Plan calls for the Plan Funds, net of the Trustee's estimated fee in the amount of \$2,666.74 (6.3%), to be disbursed as follows:

<u>Claimant</u>	<u>Claim Amount</u>	<u>Claim Type</u>
Attorneys' Fees	\$ 2,500.00	Priority
Internal Revenue Service ("IRS")	\$ 10,200.00	Priority
Amy Myers	\$ 16,200.00	Priority
Minn. Dept. of Revenue ("MDR")	\$ 1,400.00	Priority
New York State Dept. of Taxation and Finance ("NYDT")	\$ 1,000.00	Priority
Unsecured Creditors	\$ 7,896.00	
TOTAL	\$ 44,996.00	

8. Amy Myers filed Claim No. 7 in the amount of \$27,227.66 as an unsecured claim with priority. She has also filed an objection to confirmation of the Plan. The NYDT filed Claim No. 10 in the amount of \$10,030.63, of which \$859.58 is claimed as an unsecured claim with priority on distribution, and \$9,053.50 is claimed as a secured claim. Other claims as indicated above are close in amount to claims actually filed, or have been estimated by the Debtors.

9. The Claim(s) either have not been objected to or amended by the Claimants, and therefore are deemed allowed under 11 U.S.C. § 502(a). Paragraph 3 of the Plan provides that the Trustee shall pay priority claims in the amounts actually allowed. The requirements of 11 U.S.C. § 1322(a)(2) preclude confirmation of a plan unless it provides for full payment of all claims entitled to priority. The requirements of 11 U.S.C. § 1325(a)(5) with respect to allowed secured claims preclude confirmation. *11 U.S.C. § 1325(a)(5)(B).*

10. Including the claims of Debtor's counsel, Amy Myers, and the Debtors' estimates of claims of the IRS, MDR, and NYDT, the total amount of the priority claims to be paid by the Trustee is \$32,600. There is no provision in the Plan for the secured claim of the NYDT, and Amy Myers' claim is substantially higher than the Debtors' estimate.

11. There is a discrepancy between the net funds to be paid into the plan by the Debtors **\$44,996** and the funds needed to pay the allowed priority and secured claims in the amount provided for in the Plan, **(\$51,212.70)** without consideration of the Trustee's fee or any return to general unsecured creditors.

12. The case has been continued from month to month to enable the Debtors to modify the Plan.

13. As of the date of this Objection, there is no indication that the Debtors are willing to or will be able to increase payments to the Trustee to pay all allowed claims in the amount required to obtain a discharge under Section 1328 of the Bankruptcy Code.

14. As a result of the foregoing, the plan is no longer feasible.

15. The creditors, if any, of a class lower in priority than the class of the Claim(s) may never receive the distribution contemplated under the plan.

16. As a further result of the present circumstances, the lower priority creditors, if any, will be delayed from the collection of their claims during the pendency of this Chapter 13 case.

17. The effect of these circumstances is that the lower priority creditors, if any, will have detrimentally relied upon the confirmed plan with the expectation of future payment, only to discover at the end of the plan term that they will receive no payment.

WHEREFORE, the Movant requests entry of an order denying confirmation of the Plan, and for such other relief as the Court deems just and proper.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: October 22, 2004

/e/ Margaret H. Culp
Thomas E. Johnson, #52000
Margaret H. Culp, #180609
Chapter 13 General Counsel
310 Plymouth Building
Minneapolis, MN 55402
(612) 338-7591

VERIFICATION

I, Margaret H. Culp, for Movant, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 22, 2004

/e/ Margaret H. Culp

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MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION

FACTS

The Trustee relies upon the facts set forth in her verified motion, which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

One of the fundamental requirements for confirmation of a Chapter 13 plan is found in 11 U.S.C. § 1322(a)(1), which states that a plan shall “provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” *11 U.S.C. § 1322(a)(1)*. Essentially, this statute requires the debtor to propose a plan that is fully funded, in the sense that the debtor commits to making sufficient payments to pay all amounts required to be paid to creditors under the proposed plan.

Here, the Debtors have only committed to paying a total of \$44,996 Trustee, yet the total priority and secured claims filed to date or provided for in the Plan exceed that number, taking into consideration the fact that the total Plan Funds will be reduced by the Trustee’s statutory fee. The Plan is under-funded and therefore unconfirmable.

CONCLUSION

The Debtors’ plan is not confirmable because it does not propose sufficient payments to fully fund it. Confirmation should be denied.

October 22, 2004

Respectfully submitted:
Signed: /e/ Margaret H. Culp
Thomas E. Johnson, ID #52000
Margaret H. Culp, ID #180609
Counsel for Chapter 13 Trustee
310 Plymouth Building
12 South Sixth Street
Minneapolis, MN 55402
(612) 338-7591

UNITED STATES BANKRUPTCY COURT
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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on October 22, 2004, I served Trustee's Objection to Confirmation and Notice of Hearing and Motion for Dismissal or Conversion on the individual(s) listed below, in the manner described:

By facsimile:

United States Trustee
612-664-5516
Terri Georgen-Running, Esq.
651-292-1234

By first class U.S. mail, postage prepaid:

Robert L. Myers
Betty A. Myers
4302 Beaver Dam Road
Eagan, MN 55122

Terri Georgen-Running, Esq.
P.O. Box 16355
St. Paul, MN 55116

Linda Jeanne Jungers, Esq.
Stewart, Zlmen & Jungers
430 Oak Grove Street, #200
Minneapolis, MN 55403
Attorneys for Ford Motor Credit

Gary Rosen, Esq.
Gary Rosen Law Firm, P.C.
7 Penn Plaza, Suite 904
New York, NY 10001

Amy N. Myers
50 Fairfield Avenue
Port Washington, NY 11050

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 22, 2004

/e/ Margaret H. Culp

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ORDER SUSTAINING OBJECTION TO CONFIRMATION

At St. Paul, Minnesota _____, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on Chapter 13 Trustee's Objection to Confirmation.

Appearances were as noted in the minutes.

Upon the foregoing motion, the arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

The Trustee's Objection to Confirmation is **SUSTAINED**.

Gregory F. Kishel
Chief United States Bankruptcy Judge